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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE CITY OF SEATTLE,
Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF OF PETITIONER

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February 1991

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In our petition, we showed that the decision of the Supreme Court of Washington directly conflicts with the Second Circuit's decision in *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 18, 1990) (No. 90-900), and is altogether inconsistent with this Court's decisions interpreting the Free Exercise Clause of the First Amendment. We also showed that this case presents an important constitutional issue: whether the exteriors of church buildings must be exempted from the application of preservation legislation of a kind that has been adopted by all 50 states and hundreds of municipalities.[1]

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[1] *See also* Motion for Leave to File and Brief of the National Trust for Historic Preservation as *Amicus Curiae* in Support of the Petitioner City of Seattle, Brief at 2-3, 8-9 (filed Feb. 8, 1991) (noting the increase in the number of historic preservation laws).

Since our petition was filed, the religious organization involved in the *St. Bartholomew's* case has also filed a petition for a writ of certiorari, noting the conflict between the decision in that case and the decision in this one. Petition for a Writ of Certiorari at 7-8, *St. Bartholomew's Church v. City of New York*, No. 90-900 (filed Dec. 10, 1990); Reply Brief in Support of Petition for a Writ of Certiorari at 1-2 (filed Feb. 11, 1991). But while the two decisions are indeed in direct conflict, the specific issue in *St. Bartholomew's* is a narrower one that would not arise at all if the decision of the Washington Supreme Court in *this* case were correct. The decision in this case wholly exempts buildings owned by religious organizations from designation and protection as landmarks, on the ground that the mere possibility of having to submit plans to alter designated features of landmarked buildings to secular review is an excessive burden upon the exercise of religion. If that were the law, the review process and the outcome challenged in *St. Bartholomew's* could never have occurred.

Respondent's brief in opposition in this case concedes the conflict with *St. Bartholomew's*, makes no response to our showing of inconsistency with this Court's First Amendment decisions, and implicitly concedes that the issue in this case is one of substantial importance. Instead of responding to the points urged in the petition, respondent asserts two barriers to review, both of which lack merit.

First, respondent argues that the Washington Supreme Court rested its decision on an adequate and independent state ground. This argument violently misconstrues *Michigan v. Long*, 463 U.S. 1032 (1983), which is on point and dispositive. Here, almost exactly as in *Long*, the state court analyzed only the federal constitutional provision and cited only case discussion of federal law

and then,[2] in a conclusory sentence plus other incidental references, cited a provision of the state constitution along with the federal constitutional provision without explaining the significance of the state provision. *Long* squarely holds that this kind of unexplained parallel invocation of a state constitutional provision, in the course of an opinion that in all other respects appears to turn on federal law, does not establish an adequate and independent state ground for decision.

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. This Court has repeatedly reconfirmed its holding in *Long*.[3] Respondent's discussion of pre-*Long* decisions, its citations to its own brief on a motion for stay that was denied without explanation, its invocation of the absence of state law on point, and its references to the state court's citation of state cases to resolve a different issue in the case are irrelevant.[4]

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[2] Respondent emphasizes that two state *court* cases were cited in the opinions below, but both citations were for points of federal law. As we noted in the petition, *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1122-23, *cert. denied*, 110 S. Ct. 147 (1989), was cited below for its analysis of this Court's free exercise decisions. App. 9a; *see* Petition at 7 n.5. *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 639 P.2d 1358 (1982) (en banc), cited in the concurring opinion below, rested solely on the state court's interpretation of the First Amendment. App. 22a-23a; *see* Respondent's Br. at 7.

[3] *See, e.g., Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2701-02 n.5 (1990); *Pennsylvania v. Muniz*, 110 S. Ct. 2638, 2643 n.4 (1990).

[4] In fact, the Washington Supreme Court has made it clear, and reiterated in *State v. Motherwell*, 114 Wash. 2d 353, 368, 788 P.2d

Second, respondent suggests that this case is "moot" because the Washington Supreme Court has issued its mandate pursuant to which the trial court has issued a final judgment. There is no question of mootness here: the controversy between the City of Seattle and First Covenant Church, over whether the First Amendment forbids the City's effort to preserve historic church buildings, is alive and concrete, and this Court could resolve that controversy differently than the Washington Supreme Court has done. Respondent's real argument is not that the case is moot but that the state court decision has been immunized from review because the trial court entered its judgment before this Court could rule on a petition for a writ of certiorari. Respondent's Br. at 10-11. That remarkable proposition (which would force this Court to stay state court decisions to preserve its own jurisdiction even where the entry of a state judgment has no immediate practical consequences) is quite wrong:

> The issuance of the lower court's mandate . . . does not destroy the power of the Supreme Court to

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1066, 1074 (March 22, 1990) (en banc), a Free Exercise Clause case decided the same day as the present case, that where a claim is made under parallel federal and state constitutional provisions the court will examine the federal claim first and "will consider whether to apply our state constitutional provisions more strictly than parallel federal provisions only if we are asked to do so . . . and even then only if the argument includes proper analysis of the six 'interpretive principles' outlined in *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986)." In *Gunwall*, the court had said, "[r]ecourse to our state constitution as an independent source [from the federal Constitution] for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned." 106 Wash. 2d at 63, 720 P.2d at 813 (footnote omitted). No such specific request, or analysis of the six principles, or reasoning was offered to the state courts in this case; nor was any such analysis presented in the brief in opposition. There is no reason to believe that the court below accorded any independent significance to the state constitutional provision.

> review the lower court's judgment. *Carr v. Zaja*, 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 467 (1947); and see *Louisville & N.R. Co. v. Behlmar*, 169 U.S. 644, 648 (1898). Nor will the Court be prevented from reviewing and reversing the decision below if the lower court judgment is obeyed, unless the nature of the case is such that reversal by the Supreme Court could then have no effect.

R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 17.10, at 674 (6th ed. 1986).

Finally, we note that since the filing of the petition, the Supreme Judicial Court of Massachusetts has decided *Society of Jesus of New England v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E.2d 571 (1990). The court there held that the designation of the *interior* of a church as a landmark violated the Massachusetts Constitution. The court specifically noted that the case did not involve landmark designation of a church's *exterior*, *id.* at 572 n.2, and distinguished its earlier advisory opinion that the designation of a church exterior is unobjectionable, *id.* at 73 (citing *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563, 568 (1955)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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